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NO. 469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

ATTY M. JACKSON, *Petitioner*

versus

BURR LAMBERT, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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INDEX

	Page
Summary of the Matter Involved	1
Basis for the Supreme Court's Jurisdiction	3
The Questions Presented	4
Reasons for Allowance of the Writ	4

AUTHORITIES CITED

Clay vs. Field, 138 U. S. 474, 34 Law Edition, 1044, 1047-

Taylor vs. Catalon, 166 S. W. 2d 102

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SUMMARY OF THE MATTER INVOLVED

F. B. Jackson, Jr. procured a divorce from the petitioner, Mrs. F. B. Jackson, Jr., without having the community property rights adjudicated. The divorce was procured in Arkansas, but the parties were resident citizens of Texas and owned community property consisting,

in part, of a one-half interest in an oil well drilling business owned by a partnership composed of the said F. B. Jackson, Jr. and the respondent, Burr Lambert, which business was carried on for many months and possibly years after the divorce was granted (R. 9, 64) without any offer of settlement or dissolution by any of the parties and without any complaint or objection to the continuance of the business by anyone concerned (R. 9, 64, 51, 22).

The Circuit Court of Appeals and the trial court held that under these circumstances the petitioner never became a partner, and that she was not entitled to an accounting for her interest in the partnership business in any event.

It is our contention that immediately upon the granting of the divorce, the petitioner became a tenant in common with her ex-husband in his one-half of the partnership business, and, since the partners, Lambert and Jackson, continued to carry on the business in the same way for months or years without settling or offering to settle with the petitioner, they impliedly accepted her as a partner, and, since she raised no objection to the continuance of the business in that manner, she impliedly consented to become a partner, and, therefore, the partnership relation arose by implication.

If the court should reject the partnership theory, the petitioner is still entitled to an accounting for her one-half interest in her husband's interest in the partnership business, because it is undisputed that the partnership of Lambert and Jackson, at the time of the divorce, was a going concern and possessed a considerable amount of property.

BASIS FOR THE SUPREME COURT'S JURISDICTION

We think the court has jurisdiction of this case, because the decision of the Circuit Court of Appeals and that of the trial court are at variance with the holdings of the Supreme Court of Texas and the Supreme Court of the United States in that those courts held that (1) the partnership relation never arose between the petitioner and F. B. Jackson, Jr. and Burr Lambert, and (2) that, under the circumstances of this case, the petitioner did not have such an interest in the partnership business as would entitle her to an accounting.

In Taylor vs. Catalon, 166 S. W. 2d 102, the Supreme Court of Texas held that upon the dissolution of the marital relations by divorce, the husband and wife became tenants in common of their community property.

In Clay vs. Field, 138 U. S. 474, 34 Law Edition, 1044, 1047, the Supreme Court said:

> "The general principle of law undoubtedly is, that on the dissolution of the firm by the death of one of the partners, it is the survivor's duty to settle up the partnership affairs within a reasonable time, and pay over to the representatives of the deceased partner the amount due them; and if he takes the responsibility of continuing the business of the firm, and using the property of the partnership, he become liable for losses that may occur, and it is the option of the representatives of the deceased partner either to insist upon a division of the profits, which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm."

THE QUESTIONS PRESENTED

The questions presented are (1) whether the petitioner ever became a partner in the Lambert and Jackson partnership and was entitled to an accounting as such, and (2) whether the petitioner was entitled to an accounting for her one-half interest in her husband's interest in the partnership business upon the theory of tenancy in common.

REASONS FOR ALLOWANCE OF THE WRIT

The decision of the Circuit Court of Appeals herein is in conflict with the decision of the Supreme Court of the United States on the same matter and has decided an important question of law in a way probably in conflict with applicable local decisions. We also think that on account of the importance of the question here raised, the writ should be allowed.

The Circuit Court of Appeals and the trial court have held herein that the divorced wife of the said F. B. Jackson, Jr. had no right to an accounting as a partner in the partnership business owned by her husband and another at the time of the divorce, although it was undisputed that the business was carried on for many years after the divorce in complete disregard of the rights of the petitioner, and this holding, we think, is in conflict with the prior decisions of the Supreme Court of the United States. The lower courts also held that the petitioner was not entitled to an accounting as a tenant in common, which holding is in conflict with the prior holding of the Supreme Court of the State of Texas.

Premises considered, the petitioner respectfully prays that a writ of certiorari be granted herein in order that the errors complained of may be corrected.

Respectfully submitted,
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PETITIONER'S BRIEF

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INDEX

Summary of Argument 1
List of Authorities Cited 2
Caption 3
A Statement of the Facts 4
The Contested Issues 5
Propositions of Law Relied On 5
Argument 6
Signature 11

SUMMARY OF ARGUMENT

Upon the dissolution of the marital relation the petitioner became a tenant in common with her husband in his one-half interst in the partnership of Lambert and Jackson, but since Lambert and Jackson continued to carry on the partnership business without an accounting or settlement for a period of seven years without objection from any one concerned, (R 9, 51-3), Lambert and Jackson impliedly accepted the petitioner as a partner, and since she raised no objection to the continuance of the business (R 51-3), she impliedly consented to become a partner.

LIST OF AUTHORITIES CITED

Clay vs. Field, 139 U. S. 474, 34 Law Ed. 1046 7

New York Life Insurance Company vs. Hageman et al, 80 Federal 2d 446 (7th Circuit) 10

Taylor vs. Catalon, 166 S. W. 2d 102 (Supreme Court of Texas) 6

Clausen vs. Puvogel et al, 100 N.Y.S. 49 9

Meyer vs. Meyer et al, 194 N.Y. Sup. 718 8

Shenk vs. Lewis, 118 S.E. 631 (Supreme Court of South Carolina) 9

Tufts vs. Latshaw, 72 S.W. 679 (Supreme Court of Missouri) 8

Volume 80, A.L.R., 20, 26 7

Volume 47, Corpus Juris, 1076 7

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PETITIONER'S BRIEF

PETITIONER'S BRIEF
A STATEMENT OF THE FACTS

This is an action for an accounting. The case was tried before the court without a jury, and judgment was rendered against the petitioner denying the accounting, which judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit.

The facts developed upon the trial are more fully stated as follows:

The petitioner and F. B. Jackson, Jr. were married in 1918 and continued to live together in Texas as husband and wife until March 8, 1939, when F. B. Jackson, Jr. procured a divorce from the petitioner in the State of Arkansas; that during the time that they lived together as husband and wife, the petitioner and F. B. Jackson, Jr. accumulated a considerable amount of property, which, under the laws of the State of Texas, was the community property of the petitioner and the said F. B. Jackson, Jr.; that a part of the community property consisted of a steam powered oil well drilling rig and a Diamond T truck.

Prior to their divorce F. B. Jackson, Jr., with the knowledge and consent of the petitioner, entered into a partnership agreement with the respondent, Burr Lambert, for the purpose of engaging in the business of producing and marketing crude oil, buying and selling oil and gas leases and drilling oil wells in Illinois, and, by the terms of the agreement, F. B. Jackson, Jr. was to contribute the rig and truck and other things of value, and Burr Lambert was to contribute his time and labor (R. 9, 10, 51-2, 26).

No disposition was made in the divorce suit of the property rights of the petitioner and F. B. Jackson, Jr., and there was no dissolution of the partnership nor settlement with the petitioner at the time of the divorce (R. 9), but, on the contrary, Jackson and Lambert, with knowledge of the petitioner's rights, continued to carry on the partnership business in exactly the same manner as it had been carried on before the divorce until at least the latter part of the year 1941 when F. B. Jackson, Jr. claimed that he sold his interest in the partnership business to Burr Lambert (R. 53-4, 9). There was no settlement or dissolution of the partnership at that time, insofar as this petitioner was concerned, but Burr Lambert continued to carry on the business, and has until this time, in the same manner as it had been carried on before,

using the petitioner's property and incurring obligations for which she and her property were liable, and that the said Burr Lambert has continued to carry on said business (R. 9, 53-6, 26, 39, 30, 32, 33).

The court tried the case solely on the issue of whether or not the partnership relation between Mrs. Jackson and Burr Lambert ever came into existence, and, after hearing the testimony, rendered judgment against the petitioner, and that judgment was affirmed by the Circuit Court of Appeals (R. 69, 99).

Two stipulations were filed, an original and supplemental, in which all of the facts pleaded were admitted except the fact that none of the parties had ever demanded or offered a settlement or dissolution of the partnership, and this was undisputed (R. 9, 65). This fact was testified to by the petitioner (R. 51, 4), and Burr Lambert corroborated all that she said on that point. We request the court to read all of the direct examination of Burr Lambert beginning on Page 22 of the record.

THE CONTESTED ISSUES

The contested issues are (1) whether or not the petitioner ever became a partner in the firm of Lambert and Jackson and was entitled to an accounting as such, and (2) whether or not, in the absence of the partnership relation, she was entitled to an accounting upon the theory of tenancy in common.

PROPOSITIONS OF LAW RELIED ON

Where, after the divorce of one of the partners, the partnership business is continued for several years without a settlement or dissolution, and without protest from any one concerned, the divorced wife is entitled to an accounting (1) as a partner, and (2) upon the theory of tenancy in common

with her ex-husband in his part of the partnership assets.

AUTHORITIES

Clay vs. Field, 138 U. S. 474, 34 Law Ed. 1046
New York Life Insurance Company vs. Hageman et al 80 Federal 2d 446 (7th Circuit)
Taylor vs. Catalon, 166 S. W. 2d 102 (Supreme Court of Texas)
Clausen vs. Pugovel et al, 100 N.Y.S.
Meyer vs. Meyer et al, 194 N.Y. Sup. 718
Shenk vs. Lewis, 118 S.E. 631 (Supreme Court of South Carolina)
Tufts vs. Latshaw, 72 S.W. 678 (Supreme Court of Missouri)
Volume 80, A.L.R., 20, 26
Volume 47, Corpus Juris, 1076

ARGUMENT

We think the foregoing statement shows beyond question that there was an implied agreement among Burr Lambert, F. B. Jackson, Jr., and the petitioner, Atty M. Jackson to the continuance of the partnership business following the divorce, and that there was an implied agreement between the petitioner, Atty M. Jackson, and Burr Lambert to the continuance of the partnership business following the settlement between Burr Lambert and F. B. Jackson, Jr.

Ordinarily, upon the death of a member of a partnership, the partnership is presumed to be dissolved, and the assets are held by the surviving partners and the heirs of the deceased partners as tenants in common unless there is a revival by agreement, expressed or implied, of the partnership relation. 80 A.L.R. 20. We think an analogous situation arose upon the dissolution of the marital relation between the petitioner and F. B. Jackson, Jr.

In Taylor vs. Catalon, 166 S.W. 2d 102 (Supreme Court of Texas), the court held that upon the dissolution of the

marital relation by divorce, the husband and wife became tenants in common of their community property. Therefore, the petitioner, Atty M. Jackson, and F. B. Jackson, Jr. became tenants in common in Jackson's one-half interest in the partnership upon the rendition of the divorce decree, and, when Lambert and Jackson failed to settle with her within a reasonable time and continued to carry on the partnership business with her consent, she became a partner by implication.

On Page 26 of Volume 80, A.L.R., is the following statement:

> "So, the result in the case of Parsons v. Hayward (English case) in which a partner who had failed to wind up the affairs of the firm at the expiration of the term in accordance with the partnership article but had continued in the business, was held accountable for subsequently earned profits, was based upon the ground that the partnership had not really been dissolved, but had been continued by implied contract." Citing a number of American cases.

In Clay vs. Field, 138 U. S. 474, 34 Law Ed. 1044, 1047, the court said:

> "The general principle of law undoubtedly is, that on the dissolution of the firm by the death of one of the partners, it is the survivor's duty to settle up the partnership affairs within a reasonable time, and pay over to the representatives of the deceased partner the amount due them; and if he takes the responsibility of continuing the business of the firm, and using the property of the partnership, he becomes liable for losses that may occur, and it is the option of the representatives of the deceased partner either to insist upon a division of the profits, which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm."

On Page 1076 of Volume 47, Corpus Juris, is the following statement:

> "In the latter case, however, the right of the legal representatives of the deceased partner to compensation for the use of the decedent's capital in the business is not

dependent upon the earning of profits, but they have the right to elect between interest on decedent's capital in the partnership business or the proportionate share of the profits of the business which is properly attributable to the use of the decedent's capital therein."

In Meyer vs. Meyer et al, 194 N.Y. Sup. 718 (Paragraph 3) the court held that it was the duty of the surviving partners to wind up the partnership and pay the estate of the deceased partner for his interest, but where they continue the business, using the capital of the deceased partner, the deceased partner's wife has the option of either demanding interest on the amount of the capital or to require an accounting for the reasonable share in the profits of the business. Citing Story on Partnership, Seventh Edition, Section 373. The court further held that the survivors were bound to utmost fairness of disclosure, and that they were under the duty of accounting to the widow of the deceased partner.

In Tufts vs. Latshaw, 72 S.W. 679, 683, the Supreme Court of Missouri held:

"The point is made by defendant that the evidence did not sustain the allegations of the petition, but we do not agree to this contention. The petition alleges that Williams, instead of settling up the partnership estate, used its assets in the continuation of the business until he made the assignment to the defendant, who then took charge of and sold and disposed of them. Defendant claims that there was evidence tending to show that a portion of the property that went into the assignee's hands was purchased by Williams with his individual funds; but, even if this was so, the law is well settled that, when a person who holds property in a fiduciary capacity mixed his own property with it so that it cannot be separated nor the amount of each ascertained, the whole becomes, both at law and in equity, the property of the trust estate. National Bank vs. Insurance Co., 104 U. S. 54, 26 L. Ed. 693. In Perry on Trusts, section 838, it is said: 'Upon the same principle, if the executor of a deceased partner is also the surviving partner, and he continues the deceased partner's capital without author-

ity in the business, and changes the property many times over, yet the court follows the trust fund through all these changes, and gives the beneficiaries of the deceased partner's estate the capital, and all its proceeds or gains in the business in which it has been employed'."

In Shenk vs. Lewis, 118 S.E. 631 (Supreme Court of South Carolina), the court said:

"Upon the dissolution of a partnership by the death of one of the partners, the following principles of law are applicable:

(1) The surviving partner immediately becomes a trustee of the entire partnership property, for the purpose of liquidating the affairs of the partnership, and as expeditiously as the circumstances of the partnership will permit, to convert the assets into cash, pay off the liabilities, adjust the equities between the partners, and distribute the remainder of the estate between the surviving partner and the representative of the deceased partner according to their respective interests.

* * * * *

If they (surviving partners) go on with the business under the credit, and risking the effects of the firm, and profits result, they will be bound to account for those profits as belonging to the firm, and they are liable to be so charged with interest on the funds they use, though no profit, or even a loss, is made." Riddle vs. Whitehill, 135 U.S. 621, 10 Sup. Ct. 924, 34 L. Ed. 283.

In Clausen vs. Puvogel et al, 100 N.Y.S. 49, the Court said:

"The plaintiff, in the circumstances disclosed had her election to have an accounting to the estate as of the date of the death of her father, and to demand that the surviving partner account for and pay over the share of the assets of the estate to which she would be entitled, together with interest thereon, or, instead of asserting this claim for interest, to claim the profits of the business, which, according to her theory, was wrongfully conducted by the appellant with the firm assets. Having made such election, she is only entitled to an accounting for the principal and for the profits which take the place of interest. In such case the appellant is not obliged to

> account in detail for the business as conducted by him, and he may in the first instance merely account for the profits, but the contestant is then at liberty to show that the profits are greater than the amount admitted."

In New York Life Insurance Company vs. Hageman 80 Federal 2nd 446, 447, (7th Circuit), the Court said:

> "We find nothing in this record tending to indicate that after the death of Weiner there ever was a winding up of the affairs of this partnership. Not only does the record fail to disclose any such winding up, but it indicates facts tending to show that the parties regarded the partnership as continuing. The same business continued to be carried on, in the same partnership name, until the death of the last surviving partner. So far as the record discloses, whatever of Weiner's capital or interest was in the partnership at his death remained there after his death. If it so remained, and the business continued to be carried on as before, it is fair to assume that this was with the consent of the surviving partners and of the heirs and the personal representatives of the deceased partner." See People v. Zangain, 301 Ill. 299, 303, 133 N.E. 783.

The undisputed facts show that after the divorce Burr Lambert and F. B. Jackson, Jr. carried the business on in exactly the same way that it had been carried on before the divorce and under the same partnership name, and that Burr Lambert, after the dissolution between himself and F. B. Jackson, Jr., continued to carry on the business under the same name and in exactly the same way that it had been carried on before, and we think that under these circumstances, there is no escape from the conclusion that there was an implied agreement on the part of all parties to continue the partnership relation.

But, if the court does not agree with the partnership theory, then certainly upon the granting of the divorce, the petitioner and her ex-husband became tenants in common in his share of the partnership assets, and she is entitled to an accounting on that theory.

Premises considered, petitioner respectfully prays that the judgment of the trial court and the Circuit Court of Appeals be reversed and that the cause be remanded for a trial on the merits.

Respectfully submitted,
ATTY M. JACKSON, *Petitioner*

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BURR LAMBERT,

Respondent.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Statement of the Case	1
Jurisdiction	4
Specification of Assigned Errors	4
Summary of the Argument	5
Argument	6
Conclusion	16

Cases Cited.

Clark v. Sidway, 142 U. S. 682, 35 L. Ed. 1157	14
Diamond v. Gust, Tex. Civ. App., 206 S. W. 366, 369	10
Egan, et ux. v. American State Bank, Tex. Civ. App., 67 S. E. (2) 1081, 1085	10
Kasch v. Commissioner of Internal Revenue, (C. C. A. 5th) 63 Fed. (2) 466, 468	11
Layne v. Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 393, 67 L. Ed. 712	16
Locke v. Locke, Tex. Civ. App., 143 S. E. (2) 637, 638.	8
London Assurance Co. v. Drennen, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688	12
Magnum Import Co. v. DeSpoturno Coty, 262 U. S. 159, 67 L. Ed. 922	16
Manufacturer's Equipment Company v. Cisco Clay & Coal Co., (Tex. Civ. App.) 15 S. W. (2) 609, 612	12
Meehan v. Valentine, 145 U. S. 611, 618, 36 L. Ed. 835.	15
New York Life Ins. Co. v. Hageman, (C. C. A. 7th) 80 Fed. (2) 446, 448	13

Purdom v. Boyd, Tex. Sup. Ct., 17 S. W. 606, 607..... 11
Russell v. Russell, Tex. Civ. App., 79 S. W. (2) 639, 641 14
Taylor v. Catalon, 166 S. W. (2) 102 (Sup. Ct. of Texas) 7, 12
The Fourth National Bank of the City of New York v. The New Orleans and Carrollton Railroad Company, et al., 11 Wall. 624, 20 L. Ed. 82, 83..... 9
Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. Ed. 736 14
Wright v. State, Tex. Civ. App., 71 S. W. (2) 352, 353 11

TEXTS CITED.

40 American Jurisprudence, Section 5, Page 129..... 14
DeFuniak, Principles of Community Property (1934), Volume 1, Section 172, Page 484..... 10
32 Texas Jurisprudence, Page 223..... 11

STATUTES CITED.

Article 4619, Vernon's Civil Statutes of Texas, Annotated 8

RULES OF COURT CITED.

Rule 27(c), Rules of the Supreme Court..... 4
Rule 27(e), Rules of the Supreme Court..... 4

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BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioner's statement of the case is substantially correct except for the following omissions and inaccuracies.

This action was brought in the District Court of the United States for the Southern District of Indiana by the Petitioner against the Respondent seeking to establish a partnership relation by implication between the two (2) parties. A partition of the assets of the alleged partnership was demanded and an accounting sought of the profits

alleged to have resulted from the operation of the said partnership.

A partnership had been entered into between F. B. Jackson, Jr. (former husband of the Petitioner) and the Respondent, in the State of Texas in August, 1937, for the purpose of drilling oil wells (R. 9), and the Respondent contributed to this partnership certain equipment (R. 26).

F. B. Jackson, Jr. (former husband of the Petitioner) contributed to the partnership a steam drilling rig, derrick and other equipment which was the community property of the Petitioner and the said F. B. Jackson, Jr. (R. 9). The Petitioner admitted in her complaint that her former husband had the right to so dispose of the community property and that the contribution thereof was made with the Petitioner's consent (R. 3).

At the time of the divorce between the Petitioner and her former husband, the said F. B. Jackson, Jr., the partnership between the latter and the Respondent was in existence and was subsequently dissolved (R. 9). When the partnership was dissolved the latter part of May or the first part of June, 1939, the Respondent assumed all of the obligations of the partnership and acquired whatever equipment was owned by it (R. 34). The Respondent had no dealings whatsoever with the Petitioner (R. 32-33) nor communicated with her in any way concerning the partnership between himself and the said F. B. Jackson, Jr. (former husband of the Petitioner) (R. 33, 42). No recognition of any kind was ever given the Petitioner by either her former husband, F. B. Jackson, Jr., or the Respondent, as a partner (R. 54, 56, 58, 59).

The Respondent controverts the statements of the Petitioner found on page 4 of her brief to the effect that the Respondent and the said F. B. Jackson, Jr. (former husband of the Petitioner) with knowledge of the Petitioner's

rights, continued to carry on the partnership business, there being nothing in the record to substantiate such a statement. The Respondent further controverts the statement of the Petitioner found on page 4 of her brief to the effect that the Respondent continued to carry on the business of the partnership using the Petitioner's property and incurring obligations for which she and her property were liable and that the Respondent has continued to carry on said business, there being nothing in the record to substantiate such a statement.

The stipulations filed, speak for themselves and do not admit all of the facts pleaded in the plaintiff's complaint (R. 1-8, 9-10, 64) as stated by Petitioner on page 5 of her brief. The record discloses that the Petitioner's former husband (F. B. Jackson, Jr.) who was the only person with whom the Respondent dealt and with whom he formed a partnership, was not made a party to this proceeding (R. 1-8).

The Trial Court found that during the existence of the marriage between the Petitioner and F. B. Jackson, Jr. (her former husband), she was not a member of the partnership between the said F. B. Jackson, Jr. and the Respondent; that at the time of the divorce and thereafter, neither the said F. B. Jackson, Jr., nor the Respondent, by word or conduct, expressly or impliedly, accepted or recognized the Petitioner as a partner with them or either of them in the partnership and that during the period of the existence of the partnership of the said F. B. Jackson, Jr. and the Respondent, the Petitioner never became a member thereof (R. 67). The Trial Court concluded that the Petitioner was not a member of the partnership between F. B. Jackson, Jr. (her former husband) and the Respondent, Burr Lambert (R. 67) and judgment was rendered against the Petitioner that she take nothing in the action (R. 68-69).

From this judgment the Petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit (R. 87).

Counsel for the Petitioner did not appear at the hearing of the cause in the Circuit Court of Appeals (R. 99) and the Court affirmed the judgment of the lower Court, without opinion. The Petitioner filed a petition for rehearing which was denied (R. 100).

JURISDICTION.

Petitioner's brief does not contain a statement of the grounds on which the jurisdiction of this Court is invoked, as required by Rule 27(c) of the Rules of this Court.

SPECIFICATION OF ASSIGNED ERRORS.

Petitioner's brief fails to contain a specification of such of the assigned errors as are intended to be urged, as required by Rule 27(e) of the Rules of this Court.

SUMMARY OF THE ARGUMENT.

I.

The United States Circuit Court of Appeals for the Seventh Circuit affirmed, without opinion, the decision of the District Court for the Southern District of Indiana, holding that a partnership relation did not arise between the Petitioner and the Respondent, by implication upon certain facts outlined in Respondent's statement of the case and argument.

II.

The Petition and Brief fail to disclose any conflict between the Seventh Circuit's decision in the case at bar and the decisions of this Court or the decisions of the Courts of Texas, which is the jurisdiction where the controversy arose. The decisions of this Court and the Texas Courts fully support the decision of the Seventh Circuit which affirms the Trial Court's finding that a partnership relation did not arise between the Petitioner and the Respondent.

III.

The Petition and Brief do not disclose any reason for review of the case at bar by Writ of Certiorari. The Petition merely seeks another hearing which is not afforded to a litigant by certiorari to this Court.

ARGUMENT.

PART I.

The Question Involved and the Decision of the Seventh Circuit.

The United States Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the Trial Court which found that no partnership relation arose between the Petitioner and the Respondent by implication. The finding was based upon the following facts (R. 66-67):

(a) Community property owned by the Petitioner and her husband in the State of Texas, was contributed by the latter to a commercial partnership formed between her said husband and the Respondent; and,

(b) A divorce was subsequently granted dissolving the former community estate without a settlement of the property rights of the two (2) spouses (*i. e.*, the Petitioner and her former husband); and,

(c) The commercial partnership between the Petitioner's former husband and the Respondent was carried on subsequent to the divorce and later voluntarily dissolved, without any effort made on the part of the Petitioner's former husband and the Respondent, to settle with the Petitioner and without recognizing or accepting her in any manner whatsoever, in so far as the said commercial partnership was concerned.

The action was brought in the lower Court solely on the theory that the Petitioner became a partner with the Respondent by implication (R. 1-10) and was tried on that theory by the Court (R. 66, 67). On appeal to the Seventh Circuit the sole point upon which the appeal was predicated, was the contention that such a partnership was formed by implication (R. 72-73), although no alleged error or errors in the proceedings in the lower Court were set forth or

asserted. The so-called contested issue mentioned on page 5 of Petitioner's brief, but not supported by any authorities, relating to an accounting upon the theory of tenancy in common was not presented to the Seventh Circuit and as hereinafter demonstrated, is wholly without merit.

Part II.

There Is No Conflict Between the Seventh Circuit's Decision in the Case at Bar and the Decision of the Texas Courts and of This Court.

While the brief filed by Petitioner does not assert that the decision of the Seventh Circuit is in conflict with the decisions of the Texas Courts, the petition does contain such a statement (Petition, p. 3). The decisions cited in the petition and in the brief of the Petitioner have no application whatsoever to the questions involved on the merits and the citations given do not support any grounds for the review of this cause. With the exception of the case of *Taylor* v. *Catalon*, 166 S. W. (2d) 102 (Supreme Court of Texas) cited by the Petitioner in her Petition and Brief, the remaining authorities deal with the obligation of a surviving partner of a firm dissolved by the death of one of the partners, to account and pay over unto the representatives of the deceased partner, such amount or amounts as may be due them after winding up the affairs of the partnership. In the case at bar the question concerning the obligation of a surviving partner to account to the representatives of a deceased partner, on dissolution of a partnership by death, does not arise.

There is no contention in the case at bar to the contrary and the record conclusively establishes that no partnership was ever entered into between the Petitioner, her former husband, F. B. Jackson, Jr., and the Respondent, by express agreement but she asserts that she became a partner with

the Respondent because her marriage with her former husband was dissolved without a settlement of the community estate and, therefore, she and her former husband became tenants in common of whatever property belonged to their community estate which the Petitioner contends included an interest in the commercial partnership between the Respondent and the Petitioner's former husband.

The Trial Court found that the Petitioner's husband disposed of the community property by contributing it to the partnership which he had formed between himself and the Respondent, as he had the right to do under the laws of the State of Texas and which the Petitioner admits was with her consent (R. 3). The Trial Court further found that during the existence of the marriage the Petitioner did not become a member of that partnership and that at the time of the divorce and thereafter, neither her former husband nor the Respondent, by word or conduct, expressly or impliedly, accepted or recognized the Petitioner as a partner with them or either of them in the partnership and that during the period of the existence of the partnership the Petitioner never became a member thereof.

The Seventh Circuit's affirmance of the judgment of the Trial Court is supported by the following propositions and authorities.

The contribution of community property which was owned by the Petitioner and her former husband, F. B. Jackson, Jr., to the partnership of Lambert & Jackson, was a disposition of such property which the Petitioner's former husband had the full right and power to make under the laws of the State of Texas.

Article 4619, Vernon's Civil Statutes of Texas, Annotated.

Locke v. *Locke,* Tex. Civ. App., 143 S. W. (2) 637, 638.

The Petitioner admits that the contribution was made with her consent (R. 3) and further admits in her Petition, that the laws of the State of Texas gave her former husband such right and power (R. 3).

The contribution of the community property by the Petitioner's former husband, transmuted its character and upon such investment the title thereto became vested in the partnership, the only interest remaining, being the right to receive a proper share of the residue of the partnership assets after the payment of partnership debts and the settlement of accounts between the partners. As a member of the community, the Petitioner would share in such residual interest but only after its acquisition by or distribution to her husband. It is the well established rule throughout the United States, including the State of Texas, that a partner in a commercial venture owns no specific interest in partnership assets. In an early decision of this Court in *The Fourth National Bank of the City of New York* v. *The New Orleans and Carrollton Railroad Company, et al.*, 11 Wall. 624, 20 L. Ed. 82, 83, the rule is thus stated:

> "* * * It has repeatedly been determined, both in the British and American Courts, that the property or effects of a partnership belong to the firm and not to the partners, each of whom is entitled only to a share of what may remain after payment of the partnership debts and after a settlement of the accounts between the partners; * * *"
>
> "* * * In *Field* v. *Taylor*, 4 Ves. Jr., 396, it was said that a 'party coming into the right of partner' (in any mode, either by purchase from such partner, as or a personal representative or under an execution or commission of bankruptcy) 'comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts."

In the State of Texas it has been established that the investment of property in a partnership so completely transmutes its character as to prevent a partner from asserting the right to homestead exemption against his interest without the consent of his partner. This is the pronouncement of the Court of Civil Appeals of Texas in the case of *Egan et ux.* v. *American State Bank*, Tex. Civ. App., 67 S. W. (2) 1081, 1085.

In a partnership accounting suit the Court of Civil Appeals of Texas in *Diamond* v. *Gust,* Tex. Civ. App., 206 S. W. 366, 369, defines the interest of a partner in partnership assets in the following language:

> "Nothing is to be considered as the share of a partner but his proportionate part of the residue or balance after an account has been taken of the debts and credits, including the amounts paid by the several partners in liquidating firm debts. * * *"

While it is granted that under the community property laws of the State of Texas, the Petitioner as the wife of F. B. Jackson, Jr., was entitled to one-half of all gains realized by him from his partnership venture with the Respondent, as well as her proportionate share of any residue forthcoming to him upon dissolution, it is fundamental that she did not, at any time, have or acquire an interest as such in the partnership or its assets. The rule is very clearly stated by a well recognized author on the subject of community property. DeFuniak in his work entitled Principles of Community Property (1934), Volume 1, Section 173, Page 484, discusses the subject as follows:

> "The husband having properly determined, by virtue of his exercise of administration, to place the community property in the commercial partnership, it must be subject to all obligations and demands of the commercial partnership before any right of the wife is enforceable as to such property. Similarly, her half share in profits from the commercial partnership take

effect and are enforceable only in the actual profits to which the husband may be entitled after obligations and demands of the commercial partnership are satisfied. Just because community property is invested in the partnership, just because the wife has a half share in the profits realized by the husband from the commercial partnership, no more makes the wife herself a partner in the commercial partnership than would the husband's employment by a corporation make the wife also an employee of such corporation. * * *"

The Petitioner, while married to F. B. Jackson, Jr., could not, under the laws of the State of Texas, become a partner with her husband or anyone else unless she had first been declared to be a sole trader.

32 Texas Jurisprudence, Page 223.

Kasch v. *Commissioner of Internal Revenue* (C. C. A. 5th), 63 Fed. (2) 466, 468.

Wright v. *State,* Tex. Civ. App., 71 S. W. (2) 352, 353.

There was no evidence in the case at bar and it is not contended by the Petitioner, that she had ever been declared to be a sole trader. Her disqualification is such that even though her separate property is invested in a commercial partnership, the wife is deemed to become at most a creditor to the extent of the investment thus made and not a member of the firm liable for its debts or entitled to share in its profits.

Wright v. *State,* Tex. Civ. App., 71 S. W. (2) 325 353.

Purdom v. *Boyd,* Tex. Sup. Ct., 17 S. W. 606, 607.

32 Texas Jurisprudence, Page 223.

The Petitioner was not accepted or recognized in any manner by either her former husband or the Respondent as a partner. This is the finding of the Trial Court, affirmed by the judgment of the Seventh Circuit. It is the law of

Texas that an ordinary commercial partnership is founded upon a voluntary contract and that parties are not forced into such a relationship against their will. *Manufacturers' Equipment Company* v. *Cisco Clay & Coal Company* (Tex. Civ. App.), 15 S. W. (2) 609, 612, in which the decision of this Court in *London Assurance Corporation* v. *Drennen*, 116 U. S. 461, 6 Sup. Ct. 442, 29 L. Ed. 688, is cited as authority.

It is urged by the Petitioner that she and her former husband, F. B. Jackson, Jr., became tenants in common of all community property held by them at the time of the divorce between the two (2) parties in view of the fact that no property settlement was made between the parties in connection with the divorce. It is granted that under the Texas law a divorce between two (2) spouses owning community property, without a settlement of property rights, dissolves the community and creates a tenancy in common between the spouses as to the community estate. This is the extent of the holding in *Taylor* v. *Catalon* (Sup. Ct. Texas), 166 S. W. 2d 102, cited by Petitioner. After the investment of community property by the Petitioner's husband in the commercial partnership of Lambert & Jackson, the decisions cited above establish that there was retained by him, a residual interest only, in the partnership, and it is submitted that the relationship of tenants in common created between the Petitioner and her former husband, F. B. Jackson, Jr., as a result of their divorce without a property settlement, embraced only that residual interest so far as the partnership of Lambert & Jackson was concerned. Title to the community property originally invested no longer remained in the Petitioner and her former husband and consequently no tenancy in common was or could be created with respect to the specific property originally invested or with respect to any of the assets of the partnership.

It is further urged by the Petitioner that inasmuch as she

and her former husband became tenants in common in her husband's one-half (½) interest in the partnership upon the rendition of the divorce decree that she became a partner by implication in the partnership because the two (2) partners, *i. e.*, the Respondent and her former husband, failed to settle with her and continued to carry on their partnership business. This conclusion of the Petitioner is wholly unsupported by authority. It seems quite clear that the dissolution of the marital relationship between the Petitioner and her former husband did not and could not have any effect whatsoever upon the partnership existing between her former husband and the Respondent. She was not a member of the partnership and she had no interest therein. The Petitioner could not, by virtue of the divorce without a property settlement, acquire an interest in the partnership of her former husband and the Respondent. Even in the case of the dissolution of a partnership by death, the heirs of the deceased partner do not acquire an interest in the partnership previously existing between such deceased partner and others. This is clearly demonstrated in the opinion of the Circuit Court of Appeals for the Seventh Circuit in *New York Life Insurance Company* v. *Hageman* (C. C. A. 7th), 80 Fed. (2) 446, 448, cited by the Petitioner, where the Court, at page 448, says:

> "It thus appears that the interest of a deceased partner in the partnership property does not pass to his personal representative, but vests in the surviving partner or partners for purposes of liquidation and settlement. *Andrews* v. *Stinson*, 254 Ill. 111, 98 N. E. 222, Ann. Cas. 1913B, 927; *Hayward* v. *Burke*, 151 Ill. 121, 37 N. E. 846; *Bauer Grocer Co.* v. *McKee Shoe Co.*, 87 Ill. App. 434. When Weiner died the dominion over his interest in the partnership was in his surviving partners; and when Hageman died, whatever interest he had in the partnership—either his own share thereof or in his relation as a surviving partner of Weiner—passed to Maton, the sole surviving partner, for settlement. * * *"

There was no dissolution of the partnership between the Petitioner's former husband and the Respondent until sometime after the divorce which was a voluntary dissolution, when a settlement between the parties was made (R. 34).

The only result of the divorce was the conversion of the Petitioner's community rights in the residual interest of her former husband under the Lambert & Jackson partnership into the rights of a tenant in common with her former husband in such residual interest. This residual interest proved to be, upon the dissolution of the partnership, an interest in certain oil and gas leases (R. 34) and in the release of the Petitioner's former husband's obligation or liability to discharge the partnership debts (R. 34).

While the Petitioner can assert her rights to her share of such residual interest, in an action against her former husband, which is a question not arising in the case at bar, she cannot interfere with the contractual relationship between her husband and others.

Russell v. *Russell,* Tex. Civ. App., 79 S. W. (2) 639, 641.

Assuming, for the sake of argument only, that a tenancy in common could arise between the Petitioner, her former husband and the Respondent, with respect to the partnership assets of the firm of Lambert & Jackson, it is a general rule that mere co-tenancy of property is insufficient to establish or raise a presumption of the existence of, a partnership between the co-tenants.

Clark v. *Sidway,* 142 U. S. 682, 35 L. Ed. 1157.

Thompson v. *Bowman,* 6 Wall. (U. S.) 316, 18 L. Ed. 736.

40 American Jurisprudence, Section 5, Page 129.

This Court has said in *Meehan* v. *Valentine,* 145 U. S. 611, 618, 36 L. Ed. 835:

> "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits. * * *"

It is very apparent that the essentials requisite to the establishment of a partnership between the Petitioner, F. B. Jackson, Jr., and the Respondent, Burr Lambert, have never existed. It was conclusively established that there was no contract, either express or implied, whereby the three (3) parties mentioned above placed their money, effects, labor and skill or some or all of them in the business venture together with the understanding that they were to divide the profits and bear the losses.

The Petitioner's assertion in her petition that the decision of the Seventh Circuit is at variance with the holdings of the Supreme Court of Texas and this Court, is wholly without merit, there being no citation of authority in point. To the contrary, it is submitted that the Seventh Circuit's decision in affirming the judgment of the Trial Court is in exact accord with the decisions of this Court and those of the Texas Courts cited by the Respondent.

Part III.

The Petition and Brief Fail to Disclose Any Reason for Review by Certiorari.

It is not contended that the decision of the Seventh Circuit in the case at bar conflicts with the decision of other Circuits on the same matter. There is no question of Federal Law involved nor has there been a decision of a Federal question which is in any way in conflict with applicable

decisions of this Court. It is submitted, that there is no showing of a departure from the accepted and usual course of judicial proceedings or any sanction of any such departure by a lower Court as to call for an exercise of this Court's power of supervision.

The Petitioner merely seeks another hearing and it is submitted that such relief is not afforded to a litigant by certiorari to this Court.

> *Magnum Import Co.* v. *DeSpoturno Coty,* 262 U. S. 159, 67 L. Ed. 922.

There certainly is no special or important reason apparent in this case which should impel this Court, in the exercise of a sound judicial discretion, to award the writ.

> *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U. S. 287, 393, 67 L. Ed. 712.

Conclusion.

The Respondent respectfully submits that the Petitioner has wholly failed to establish grounds for a review of the decision of the Seventh Circuit and that her petition for writ of certiorari should be denied.

Respectfully submitted,

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